



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 71

# Repetition of the general advice warning

August 2005

## What this paper is about

1 This consultation paper sets out our proposals for conditional relief from s949A of the *Corporations Act 2001* (Corporations Act). This relief will reduce unnecessary repetition of the general advice warning when oral general advice is regularly given to a retail client.

2 This paper explains:

- (a) when the general advice warning is required to be given (without relief); and
- (b) our proposals for relief from this requirement.

3 This consultation paper has been developed as part of the refinement proposals set out in the Australian Government's proposals paper *Refinements to Financial Services Regulation* (May 2005). The refinement proposals respond to concerns raised by the community about the practical operation of the changes brought about by the *Financial Services Reform Act 2001*.

4 In its proposals paper, the Government says that it is the substance of the general advice warning that is important. The form should be modified to suit the circumstances. The proposals paper also says that there are circumstances where the full repetition of the general advice warning in each communication is unnecessary (e.g. where there are regular communications between the adviser and their client) and that ASIC will use its powers to give relief, where appropriate: see Refinement Proposal 5.1.

5 This paper sets out our proposals for conditional relief from the requirement to repeat the general advice warning each time general advice is given. For guidance about how to comply with the general advice warning requirements see QFS 157 *Do I need to follow the exact wording in the Corporations Act when I give a general advice warning?* For more information about our financial services refinement projects, see Information Release [IR 05-22] *ASIC provides details on financial services refinement projects* (12 May 2005).

Note: For copies of ASIC publications mentioned in this paper, such as class orders (CO), information releases (IR) and frequently asked questions (QFS), go to [www.asic.gov.au](http://www.asic.gov.au) or contact ASIC Infoline on 1300 300 630.

## Your feedback is invited

We invite you to comment on our proposals and the issues for consideration in this paper. We would also like to receive any qualitative or quantitative information to support your comments or arguments. All

submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential. Following the comment period, we aim to publish our final policy during November 2005.

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**Your comments**

Comments are due by Monday 26 September 2005 and should be sent to:

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**or**

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You can also contact ASIC Infoline on 1300 300 630 for information and assistance.

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## Section 1: When must the general advice warning be given?

**1.1** Under s949A of the Corporations Act, licensees and their authorised representatives must give a warning to a retail client when they give general advice to that client.

Note 1: This is subject to any exceptions specified in the regulations (i.e. some general advice given in an advertisement, on a billboard or poster, or in the media, can include a more limited warning: see regs 7.7.20, 7.7.02(5A) and 7.6.01(7) and s1018A). See also Class Order [CO 05/835] *General advice in advertising*.

Note 2: For guidance about the wording that can be used to satisfy s949A(2), see QFS 157 *Do I need to follow the exact wording in the Corporations Act when I give a general advice warning?*

**1.2** The purpose of the general advice warning is to alert the retail client to the fact that the advice is general in nature and does not take into account their personal circumstances. If the warning is not given, there is a risk that the retail client will treat the advice as personal advice (i.e. as though it were necessarily appropriate for them).

**1.3** Under s949A(3), the general advice warning must be given at the same time and by the same means as the advice. This means that if the advice is given:

- (a) in writing, the general advice warning must be included once in writing in the same document;
- (b) orally in a telephone conversation, the general advice warning must be given once orally during that particular telephone conversation;
- (c) orally in a face-to-face meeting, the general advice warning must be given once orally during that particular meeting.

**1.4** There is no requirement to give the general advice warning more than once:

- (a) in a single document;
- (b) during a single telephone conversation; or
- (c) during a single face-to-face meeting.

## Section 2: Our relief proposals

**2.1** We propose to give relief from the requirement under s949A to repeat the general advice warning when:

- (a) the general advice warning is required to be given orally (e.g. during a telephone conversation or a face-to-face meeting where general advice is given) (see paragraph 2.4);
- (b) the adviser (or a person giving general advice under the same Australian financial services (AFS) licence as the adviser) has previously given the general advice warning to the retail client orally (see paragraphs 2.5-2.8);
- (c) the adviser reminds the retail client about the previous warning (see paragraphs 2.9-2.12); and
- (d) the retail client understands the reminder (see paragraphs 2.13-2.15).

Note: The term 'adviser' refers to a licensee or a representative of a licensee who gives general advice to a retail client. For more definitions of the terms used in this paper, see 'Key terms'.

### Why introduce this relief?

**2.2** The general advice warning is an important protection for retail clients (see paragraph 1.2). However, where the retail client regularly receives oral advice and already understands why they should not act on general advice as though it were personal advice, it might not be necessary to repeat the general advice warning in its entirety each time general advice is given.

**2.3** When a retail client regularly receives oral general advice, repeating the general advice warning on each occasion that general advice is given might even have a negative effect and result in the client becoming frustrated and ending their inquiry prematurely.

### Relief limited to oral communications

**2.4** We propose to limit the relief to oral general advice warnings because written warnings are not likely to cause clients to become frustrated and stop reading the advice.

### Warning previously given orally

**2.5** The relief will only apply if the warning has previously been given orally. This means that the retail client will have previously received the

general advice warning by the same means as the advice. This is consistent with general advice warning requirements under s949A(3).

**2.6** This relief requirement will reduce the risk of the retail client understanding the advice but not the warning. For example, a retail client who has difficulties reading may understand oral advice, but not understand a written warning. In this situation, it would not be sufficient or effective to give the warning in writing.

## **Who can give the warning?**

**2.7** The relief will allow the adviser to rely on a previous oral general advice warning that:

- (a) they have given themselves; or
- (b) has been given by someone else giving general advice under the same AFS licence.

**2.8** It is the licensee's responsibility to take reasonable steps to ensure that their representatives meet their general advice warning obligations: see s949A(5). Allowing an adviser to rely on the oral general advice warning that has been given by someone else when they gave general advice under the same AFS licence recognises the licensee's responsibilities. In addition, it allows the licensee to put in place processes and procedures to meet the requirements of the law and the relief, for all its representatives.

## **Adviser reminds client**

**2.9** As a requirement of the relief, the adviser must give the retail client a reminder during each conversation in which the adviser gives general advice but does not give the general advice warning (see paragraph 2.11).

**2.10** The reminder is necessary to reduce the risk of the retail client becoming confused about whether the advice takes into account their personal circumstances.

## **Reminder wording**

**2.11** The reminder will be based on the abbreviated advertising warning in reg 7.7.02(5A)(d) for billboards, posters and media advertising. The adviser must remind the retail client that:

- (a) the advice is general; and
- (b) the client should consider whether the advice is appropriate for them.

**2.12** Advisers will have flexibility in conveying these messages because we will not prescribe the words to be used.

## Did the client understand?

**2.13** The relief will only apply if:

- (a) the adviser believes; and
- (b) a reasonable person in the adviser's position would have no reason not to believe,

that the retail client understood the reminder.

**2.14** This test will apply at the time the reminder is given. This means that if the adviser *later* becomes aware that the retail client did not understand the reminder, they would not have to go back to the client to remedy the situation. However, the adviser would not be able to rely on the relief (and would therefore need to give a general advice warning) the next time they give general advice to that client.

**2.15** Factors that could affect the likelihood that a retail client will understand a reminder include:

- (a) the length of time since the retail client was given an oral general advice warning;
- (b) whether the client is sometimes given personal advice by any of the advisers giving advice under a particular AFS licence; and
- (c) any other statements made to the client about the services that will be provided (e.g. information in a Financial Services Guide given to the client).

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## Your feedback: Section 2

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- Q2.1** Do you agree that we should give relief from the requirement to repeat the general advice warning?
- Q2.2** Are the proposed requirements for relief appropriate? If not, what alternative requirements do you suggest?
- Q2.3** Should we extend the relief to written communications? If so, what would be the benefits (please give dollar estimates where possible)? What (if any) are the difficulties and costs associated with repeating the general advice warning in written communications?



**Q2.4** Should the relief only be available to the adviser who has personally given the oral general advice warning to the retail client in the past? If so, why?

**Q2.5** Are there any practical or commercial difficulties in complying with the reminder requirement? Please explain those difficulties (if any) and quantify any costs. What alternative requirement(s) would achieve a comparable level of consumer protection? What advantages would those requirement(s) have over the reminder requirement?

**Q2.6** Will the belief test (see paragraphs 2.13-2.15) affect whether advisers rely on this relief? Would it be sufficient not to require the adviser to form any view about whether the client understands that the advice they are receiving is not necessarily appropriate for them? If so, why?

**Q2.7** Is there an alternative approach to relief from the requirement to repeat the general advice warning that would better meet the needs of both retail clients and advisers taking into account the risks to retail clients described in paragraphs 2.3, 2.5 and 2.10? For example, would it be sufficient:

- for the relevant Financial Services Guides to clearly set out the status of advice going forward?
- to permit retail clients to opt out of receiving the general advice warning and for the adviser to merely specify when advice is general?

**Q2.8** Does the guidance in QFS 157 *Do I need to follow the exact wording in the Corporations Act when I give a general advice warning?* give sufficient flexibility for advisers and make relief unnecessary?

## Key terms

In this consultation paper, terms have the following meanings.

**adviser** A financial services licensee or a representative of a licensee who gives general advice to a retail client.

**AFS licence** An Australian financial services licence under s913B that authorises a person who carries on a financial services business to provide financial services: s761A.

**ASIC** The Australian Securities and Investments Commission.

**authorised representative** A person authorised under s916A or 916B to provide a financial service or financial services on behalf of the licensee: s761A.

**[CO 05/835]** (for example) An ASIC class order (in this example numbered 05/835).

**Corporations Act** The *Corporations Act 2001*, including regulations made for the purposes of that Act.

**financial product advice** A recommendation or statement of opinion, or a report of either of those things that:

- (a) is intended to influence a person in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have such an influence: s766B(1).

**Financial Services Guide** A Financial Services Guide required by s941A or 941B to be given in accordance with Division 2 of Part 7.7: s761A.

**general advice** Financial product advice that is not personal advice: s766B(4).

**general advice warning** The warning required by s949A.

**[IR 05-22]** (for example) An ASIC information release (in this example numbered 05-22).

**licensee** A person who holds an AFS licence: s761A.

**personal advice** Financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

- (a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs; or
- (b) a reasonable person might expect the provider to have considered one or more of those matters: s766B(3).

**QFS 157** (for example) A 'frequently asked question' posted on ASIC's website at [www.asic.gov.au](http://www.asic.gov.au) (in this example numbered 157).

**reg 7.7.20** (for example) A regulation from the *Corporations Regulations 2001* (in this example numbered 7.7.20).

**representative of a financial services licensee**

- (a) an authorised representative of the licensee; or
- (b) an employee or director of the licensee; or
- (c) an employee or director of a related body corporate of the licensee;  
or
- (d) any other person acting on behalf of the licensee: s910A(a).

**retail client** Has the meaning given by s761G.

**s949A** (for example) A section of the Corporations Act (in this example numbered 949A).